SURUHANJAYA SEKURITI v. DATUK ISHAK ISMAIL

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02 (IM)-1290-2011]
1 OCTOBER 2013

CIVIL PROCEDURE: *Discovery – Application for – Discovery of investigation papers – Investigation for suspected securities offence – Securities Commission Act 1993, s. 134 – Application for disclosure of investigation papers and statements by witnesses – Whether statements made under s. 134 are privileged documents – Whether must be made admissible as evidence in any proceeding in any court – Whether disclosure would prejudice other party*

STATUTORY INTERPRETATION: *Construction – Statutes – Securities Commission Act 1993, s. 134(4) – Power to call for investigation – Investigation for suspected offences committed under securities laws – Witnesses interviewed by investigating officers – Whether statements made and recorded under s. 134 must be made admissible as evidence in any proceeding in any court – Whether s. 134(4) clear and explicit – Whether ought to be given plain meaning*

The respondent had made false statements to the press as to the ability of Kenmark Industrial Company (M) Bhd ('Kenmark') to resume operations and return to profitability, which would have the effect of raising the market price of Kenmark's shares and inducing persons to purchase the same, constituting a breach of s. 177 of the Capital Markets and Services Act 2007. A few days after the statements were made, the respondent sold his shares in Kenmark. The gross sum realised was RM10,160,636, amounting to a profit of RM6,302,303.13 for a six-day investment. Based on suspicions that the respondent had committed offences under securities laws, the appellant commenced investigations on the former and 38 people were interviewed by the latter's investigating officers pursuant to s. 134 of the Securities Commission Act 1993 ('the SCA'). The respondent applied to the High Court for the disclosure of investigation papers, namely the statements given by witnesses under s. 134 of the SCA. In allowing the application and ordering the appellant to disclose the investigation papers, the High Court held that statements made under s. 134 of the SCA were not privileged documents. Hence, the present appeal. The appellant submitted that disclosure of the statements and investigation papers would prejudice its case in criminal proceedings. The fundamental issue that arose for the court's adjudication was whether the statements made under s. 134 of the SCA and the investigation papers were privileged documents.

Held (allowing appeal in part)
Per Zainun Ali JCA delivering the judgment of the court:

(1) Section 134(4) of the SCA is clear, explicit and must be given their plain meaning. It provides in no uncertain terms that any statement made and recorded under the said section shall be admissible as evidence in any proceedings in any court. In criminal proceedings, the right to disclosure of statement made in the investigation of an offence is a statutory right and is thus subject to the construction of relevant statutory provisions, particularly those under the Criminal Procedure Code. Therefore, s. 134(4) of the SCA has to be read in the light of the statutory provisions as well as case laws on criminal procedure which do not apply in the context of civil proceedings. (paras 32 & 37)

(2) In the present civil action, reference must be made to the SCA in deliberating whether the statements of witnesses and the investigation papers ought to be supplied to the appellant. What is not privileged would be liable for disclosure, bearing in mind the sensitivities of the issues at hand and balancing those against the right of the respondent to mount his defence. Thus, while affirming the order of the High Court, the said order was varied to the extent that the respondent was to avail himself only to the documents and not the investigation files relating to the respondent in relation to the allegations in paras (i) to (iv) in item 3 of Annexure A. (paras 40, 41 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah membuat kenyataan palsu kepada akhbar tentang kemampuan Kenmark Industrial Company (M) Bhd ('Kenmark') untuk meneruskan pengendalian dan mendapat pulangan keuntungan, yang akan memberi kesan penaikan harga pasaran saham Kenmark dan mempengaruh orang untuk membelinya, satu kesalahan di bawah s. 177 Akta Pasaran Modal dan Perkhidmatan 2007. Selang beberapa hari selepas kenyataan tersebut dibuat, responden menjual sahamnya dalam Kenmark. Jumlah kasar yang diperolehi ialah RM10,160,636, berjumlah keuntungan sebanyak RM6,302,303.13 bagi pelaburan selama enam hari. Mengesyaki bahawa responden telah melakukan kesalahan di bawah undang-undang sekuriti, perayu memulakan siasatan terhadap responden dan 38 orang disoal siasat oleh pegawai-pegawai penyiasat perayu, di bawah s. 134 Akta Suruhanjaya Sekuriti 1993 ('SCA'). Di Mahkamah Tinggi, responden memohon penzahiran dokumen siasatan, khususnya kenyataan yang diberikan oleh saksi-saksi di bawah s. 134 SCA. Dalam membenarkan permohonan dan memerintahkan perayu menzahirkan dokumen siasatan, Mahkamah Tinggi memutuskan bahawa kenyataan yang dibuat di bawah s. 134 SCA bukan dokumen istimewa. Oleh itu, bangkit rayuan ini. Perayu menghujahkan bahawa penzahiran kenyataan dan dokumen siasatan akan menjejaskan kesnya semasa prosiding jenayah. Isu utama yang berbangkit untuk diputuskan oleh mahkamah adalah sama ada kenyataan yang dibuat di bawah s. 134 SCA dan dokumen siasatan adalah dokumen istimewa.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 134(4) SCA jelas, nyata dan mesti ditafsirkan secara langsung. Ia tidak memperuntukkan syarat-syarat yang tidak jelas bahawa kenyataan yang dibuat dan direkodkan di bawah seksyen tersebut mesti diterima sebagai keterangan dalam mana-mana prosiding dalam mana-mana mahkamah. Dalam prosiding jenayah, hak menzahirkan kenyataan yang dibuat dalam siasatan satu-satu kesalahan adalah hak statutori dan dengan itu tertakluk pada pembentukan peruntukan-peruntukan statutori, khususnya yang termaktub dalam Kanun Tatacara Jenayah. Oleh itu, s. 134(4) SCA perlu dibaca bersekali dengan peruntukan-peruntukan statutori berserta kes-kes undang-undang tentang tatacara jenayah, yang tidak terpakai dalam prosiding sivil.

(2) Dalam tindakan sivil ini, rujukan mesti dibuat pada SCA dalam mempertimbangkan sama ada kenyataan saksi-saksi dan dokumen siasatan wajar dizahirkan kepada perayu. Apa-apa yang tidak istimewa harus dizahirkan, mengambil kira sensitiviti isu-isu yang timbul dan mengimbangkannya dengan hak responden untuk mengemukakan pembelaannya. Oleh itu, walaupun perintah Mahkamah Tinggi disahkan, perintah tersebut diubah takat mana responden boleh mendapatkan dokumen dan bukan fail-fail siasatan terhadap responden berkaitan dakwaan-dakwaan dalam perenggan (i) hingga (iv) item 3 Lampiran A.

Case(s) referred to:
BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***
Compagnie Financiere du Pacifique v. Peruvian Guano Co [1882] 11 QB 55 ***(refd)***
Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(refd)***
PP v. Yip Yee Foo (Case No. W-09-164-2011) (Unreported) ***(dist)***
Stock v. Frank Jones (Tipton) Ltd [1978] 1 All ER 948 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 177, 188, 200(2)(a), 201(6)(a), 360
Criminal Procedure Code, s. 112
Evidence Act 1950, s. 126(1)
Rules of the High Court 1980, O. 24 rr. 1(1), 3(1), 10
Securities Commission Act 1993, s. 134(4), (10), (11)

For the appellant - Tommy Thomas (Ganesan Nethi & Charandeep Kaurcso with him); M/s Tommy Thomas
For the respondent - Tan Hock Chuan (Michelle Lai & Elaine Lim with him); M/s Sreenevasan Young

[Editor's note: For the High Court judgment, please see Securities Commission v. Datuk Ishak Ismail [2011] 6 CLJ 596.]

Reported by Najib Tamby

A

JUDGMENT

Zainun Ali JCA:

[1] This is an appeal by the Securities Commission, the appellant, against part of the decision of the High Court in allowing the respondent's application for discovery of documents pursuant to O. 24 of the Rules of the High Court 1980 (RHC 1980).

B

[2] The documents in issue are the statements given by witnesses under s. 134 of the Securities Commission Act 1993 (the SCA) and the investigation papers prepared in the course of the appellant's investigation into suspected offences committed under securities laws in respect of a company, Kenmark Industrial Company (M) Berhad ("Kenmark"), whose shares were listed for trading on Bursa Malaysia.

C

Background Facts

D

[3] The background facts of the appellant's action against the respondent can be set out as follows:

(i) the primary shareholder and Managing Director of Kenmark was one James Hwang Ding Kuo ("Hwang") a Taiwanese national;

E

(ii) the appellant contends that the manner in which Kenmark's affairs were conducted by Hwang from late May 2010 to June 2010 had led to a crash of its share price caused by the market's total lack of confidence in its future; and

(iii) it is the appellant's case that the respondent had been involved in the affairs of Kenmark in the following manner:

F

(a) On 2 June 2010 and 3 June 2010, the respondent acting through his family trust fund and a company controlled by him had caused the acquisition of Kenmark shares for a total gross purchase consideration of RM3,858,353. As at 3 June 2010, the respondent owned some 57,691,900 million shares in Kenmark, amounting to 32.36% of Kenmark's share capital.

G

(b) On 3 June 2010, at the meeting of the Board of Directors of Kenmark, four new directors were appointed. The appointment was requested by Hwang at the respondent's direction.

H

(c) Following his initial acquisition of the Kenmark shares, on 4 June 2010 and 6 June 2010, the respondent made false statements to the press as to the ability of Kenmark to resume operations and return to profitability, which would have the effect of raising the market price of Kenmark shares and inducing persons to purchase Kenmark shares, constituting a breach of s. 177 of the Capital Markets and Services Act 2007 (CMSA).

I

(d) On 9 June 2010 and 11 June 2010, the respondent sold his shares in Kenmark. The total gross sum realised was RM10,160,636 amounting to a profit of RM6,302,303.13 for a six day investment.

[4] In June 2010, the appellant commenced investigations into suspected offences committed under the securities laws in respect of Kenmark. In the course of investigations, some 38 people were interviewed by the appellant's Investigating Officers pursuant to s. 134 of the SCA.

[5] On 16 June 2010, upon the appellant's application, the High Court granted an *ex parte* interim order pursuant to s. 360 of the CMSA, restraining the respondent from dissipating or otherwise dealing with funds believed by the appellant to be proceeds of offences committed by the respondent under the securities law.

[6] On 24 September 2010, the appellant commenced the present action against the respondent seeking the following relief:

(i) a declaration that the respondent made false or misleading statements or disseminated false or misleading information within the meaning of s. 177 of the CMSA *inter alia* by making press statements attributed to him concerning the affairs of Kenmark from 3 June 2010 to 9 June 2010.

(ii) a declaration that the respondent engaged in insider trading activities within the meaning of s. 188 of the CMSA when on 9 June 2010 and 11 June 2010 he sold his shares in Kenmark for a consideration amounting to a total gross of RM10,160,636, thereby earning a profit or pecuniary gain of RM6,302,283.

(iii) an order that the respondent pay to the Securities Commission the sum of RM18,906,849 representing three times his profit or pecuniary gain of RM6,302,283 pursuant to s. 200(2)(a) and/or s. 201(6)(a) of the CMSA.

[7] By way of a discovery application, the respondent sought the disclosure of the following documents:

(i) transcripts of oral examination of all persons examined by the appellant's Investigating Officers ("s. 134 statements");

(ii) Internal Memoranda passing between departments of the appellant ("Internal Memoranda");

(iii) All investigation papers and supporting documents relating to the respondent ("the investigation papers"):

(a) Alleged involvement in the acquisition and disposal of Kenmark shares as well as his alleged ownership of the said shares;

(b) Alleged involvement in the appointment of the four new Directors;

(c) Alleged dissemination of false statements; and

A (d) Alleged possession of material price sensitive information; and

(iv) all notes/notebooks recording the alleged information given by the respondent to journalists from all newspapers, in particular The Star and The Malaysian Reserve newspaper.

B **[8]** On 4 May 2011, the High Court Judge ordered the appellant to disclose all the above documents save for the Internal Memoranda. The appellant appealed against part of the decision allowing the disclosure of the s. 134 statements and the investigation papers. (The respondent had also filed a cross-appeal against that part of the decision dismissing the disclosure of the Internal Memoranda.)

C

Decision Of The High Court

[9] The learned High Court Judge found that the provision of s. 134(4) of the SCA is clear and unambiguous. The provision reads as follows:

D > Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.

[10] The learned High Court Judge also found that the s. 134 statements and the investigation papers form part of the investigation papers of the appellant in this case. Based on s. 134 of the SCA, all investigation papers E are therefore evidence which shall be admissible in court. Therefore these documents should not be hidden from the knowledge of the respondent.

[11] His Lordship further found that in respect of the s. 134 statements, they are not privileged documents. His Lordship quoted His Royal Highness Raja Azlan Shah FJ (as His Highness then was) in the case of *BA Rao & Ors* F *v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146, who observed that:

> … confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind in determining whether the public interest falls on the side of disclosure or non-disclosure.

G **[12]** Applying the above principle the learned High Court Judge found that even if s. 134 statements were to be classified in the same category as statements taken by the police pursuant to s. 112 of the Criminal Procedure Code, the claim that these are privileged documents cannot sustain.

H **[13]** In respect of the investigation papers, the learned judge also found that they are not privileged documents. On the submission of the appellant's counsel with regard to the application of s. 126(1) of the Evidence Act 1950, the learned judge found that the investigation papers by their nature, do not come within the ambit of the provision which applies only to an advocate and client relationship.

I

[14] The learned judge found unsustainable the argument that the investigation papers and the information within them may be used in future criminal prosecutions and therefore would prejudice the prosecution's case, due to the following reasons:

(i) section 134 of the SCA itself permits the admissibility of the investigation papers;

(ii) even if the investigation papers cannot be disclosed, during the trial in civil proceedings, witnesses are entitled to lead evidence based on what transpired in the investigation papers. This evidence then becomes public record that can be used later in criminal proceedings.

Appeal To The Court Of Appeal

The Appellant's Submissions

[15] Before us, both parties defended their respective cases vigorously. The appellant contended that the documents sought by respondent were those documents in relation to the investigation commenced by the appellant in June 2010, into suspected offences committed under the securities laws in respect of Kenmark.

[16] The appellant submitted that the appellant is not an ordinary private litigant but a statutory regulatory authority for the securities industry. The role and statutory functions of the appellant are to be appreciated, in view of the impact and consequence such disclosure (of the s. 134 statements and the investigation papers) would have had on the industry.

[17] In respect of the s. 134 statements, the appellant relied on an unreported decision of the Court of Appeal in the case of *PP v. Yip Yee Foo* (Case No. W-09-164-2011) where it was held that statements given under s. 134 of the SCA are protected from disclosure in criminal proceedings, as they are classified in the same category as statements taken by the police pursuant to s. 112 of the Criminal Procedure Code (the grounds of judgment of this case are not available).

[18] The appellant further averred that the same principle must be extended to civil proceedings. Otherwise it would create disharmony between the positions in civil and criminal proceedings which can be explained in the following circumstances:

(i) for offences under the securities laws, the appellant in furtherance of its statutory function can institute both criminal and civil proceedings against a person. Consequentially a person would be able to obtain s. 134 statements for use in the criminal proceedings through discovery in the civil proceedings. As a result, such person would be entitled to documents which otherwise he would not have had access to, had he been charged with a criminal offence. This defeats the prohibition on disclosure in *Yip Yee Foo;*

A (ii) there will be instances such as in the present case, where the appellant had obtained injunctive relief against a person restraining the disposal of the proceeds of the offences committed under the securities laws. It would result in grave injustice to the appellant's criminal proceedings if the person were to be allowed to obtain discovery of s. 134 statements
B merely because the appellant had obtained injunctive relief against him; and

(iii) there is also the risk of witnesses being tampered with if the identity of the witnesses are disclosed in advance to a defendant in a civil proceeding.

C

[19] The appellant further averred that with regard to the investigation papers, these are privileged documents relied on by the appellant as well as by the Attorney General's Chambers when deciding whether to institute criminal proceedings. They are therefore clearly privileged documents which are prepared for purposes of subsequent use in legal proceedings.

D

[20] In totality, it is the appellant's case that disclosure of the statements and investigation papers shall prejudice the appellant's case in criminal proceedings.

Decision

E

[21] After having heard submissions of both parties our view is this.

[22] Basically, under O. 24 r. 10 of the RHC 1980, courts have jurisdiction to order discovery of documents referred to in an affidavit. Edgar Joseph Jr J, (as His Lordship then was) in the case of *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581, (High Court) at p. 585 observed that:
F

> The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

G

[23] As had always been the case, the crucial factor for consideration in an application for discovery is relevancy; where the discovery obligation applies to documents "relating to matters in question in the action" (O. 24 r. 1(1) RHC 1980) or "relating to any matter in question in the cause or
H matter" (O. 24 r. 3(1) RHC 1980).

[24] In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be in issue. One of the clear pronouncements of the test for relevancy in the context of discovery is illustrated in *Compagnie Financiere du Pacifique v. Peruvian Guano*
I *Co* [1882-3] 11 QB 55, where Lord Brett said that:

> … It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not

> which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary … because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …

[25] As for the purpose of testing the materiality of the discovery to a particular issue – "it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought." (per Edgar Joseph Jr J, in *Yekambaran* in quoting Edward Bray).

[26] It is incumbent for the respondent to state clearly in his affidavit that it is only by obtaining the required information that he could wage his intended action to answer the claim against him.

[27] The refusal of the appellant to grant the respondent the document requested were on grounds which were quite untenable, bearing in mind that the copies of the documents sought concerned himself and were thus of direct relevance to his grievances and which were undisputably in the custody or power of the appellant.

[28] Discretion is vested in the court whether to make an order for discovery of any document or otherwise, at any stage of the proceedings. The order is necessary for a fair disposal of the cause or matter; it is trite that the discretionary power is to be exercised fairly and judiciously in the best interest of justice having regard to the circumstances of the matter.

[29] However the question of privilege may prevent the right of discovery. The Court of Appeal in *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42 at p. 60; [2008] 3 MLJ 625 at p. 646, held that:

> … At the end of the day, the decision to order discovery is dependent on the facts of each particular case (*Quilter v. Heatly* [1883] 23 Ch D 42, at pp 48-51 (CA)). Privilege may be a good cause not to allow discovery. Thus, the party against whom the order is sought will be excused if, and only if, he is privileged from producing the document asked for (*Roberts v. Oppenheim* [1884] 26 Ch D 724; and *Milbank v. Milbank* [1900] 1 Ch 376 and.

Issue Before The Court

[30] Thus, the issue before this court is whether the s. 134 statements and the investigation papers are privileged documents?

[31] It would be helpful at this stage to reproduce the entire s. 134 of the SCA 1993 which reads as follows:

> (1) If an Investigating Officer of the Commission carrying out an investigation under any securities law suspects or believes on reasonable

A grounds that any person can give information relevant to a matter that he is investigating, the Investigating Officer of the Commission may by notice in writing to such person require such person:

(a) to give to the Investigating Officer of the Commission all reasonable assistance in connection with the investigation; and

B (b) to appear before a specified Investigating Officer of the Commission or specified Investigating Officers of the Commission to be examined orally.

(1A) An Investigating Officer of the Commission exercising his authority under paragraph (1)(b) shall reduce into writing any statement made by C the person examined under subsection (1).

(2) A person referred to in subsection (1) shall be legally bound to answer all questions relating to such case put to him by the Investigating Officer of the Commission and to state the truth, whether or not the statement is made wholly or partly in answer to questions, and shall not refuse to D answer any question on the ground that it tends to incriminate him.

(3) A statement made by any person under this section shall be taken down in writing or recorded and subsequently taken down in writing and signed by the person making it or affixed with his thumb print, as the case may be, after it has been read to him and after he had been given an opportunity to make any correction he may wish:

E

Provided that, where the person examined refuses to sign or affix his thumb print on the statement, the Investigating Officer of the Commission shall endorse thereon under his hand the fact of such refusal and the reason therefor, if any, stated by the person examined.

F (3A) In an examination of a person under subsection (1), an Investigating Officer of the Commission or Investigating Officers of the Commission examining the person may do any one or both of the following:

(a) give directions about who may be present during the examination, or during any part of it;

G (b) record the examination or any part of it by audio or visual recording or a combination of both.

(4) Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.

(5) …

H (6)…

(7)…

(8)…

(9)…

I

(10) If upon an investigation made under the securities laws it appears to the Investigating Officer of the Commission that there is sufficient evidence or reasonable ground of suspicion to justify the commencement

or continuance of any proceedings against any person, the Investigating Officer of the Commission shall require the complainant, if any, and so many of the persons who appear to such Investigating Officer of the Commission to be acquainted with the circumstances of the case as he thinks necessary, to execute a bond to appear before any Court therein named and to give evidence in such proceedings.

(11) If any complainant or person referred to in subsection (10) refuses to execute a bond under that subsection, the Investigating Officer of the Commission shall report such refusal to the Court which may thereupon in its discretion issue a warrant or summons to secure the attendance of such complainant or person before itself to give evidence in the proceedings concerned.

[32] As can be seen above, s. 134(4) is clear and explicit. It provides in no uncertain terms that any statement made and recorded under s. 134 shall be admissible as evidence in any proceeding in any court. Therefore, on the construction of s. 134(4), when the words used are clear and unambiguous, they must be given their plain meaning.

[33] In *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, Lord Simon of Glaisdale cited Lord Wensleydale's golden rule of statutory construction, whereby one is to apply statutory words and phrases according to their nature and ordinary meaning without addition or subtraction, unless that meaning gives rise to an absurdity, injustice or contradiction in which case the offending word can be modified.

[34] This is of course an acceptable exception to the general rule that plain language excludes a consideration of mischievousness or absurdity. Since nothing of the sort has been demonstrated in this case, there is no reason to depart from the general rule.

[35] Thus since under s. 134(4), such statements are allowed to be admissible, we find that the learned judge was correct in ordering discovery.

[36] Thus to reiterate:

(i) upon construing the words expressed in s. 134, witnesses are compelled to cooperate in the investigation of securities offences by answering all the questions imposed on them. Such statements which must be reduced in writing and signed by the witnesses shall be admissible as evidence in any court proceedings.

(ii) based on s. 134(10) and (11) of the SCA, upon investigations, in the event of there being sufficient evidence for the commencement or continuance of any court proceedings against any person the witnesses are compelled to give evidence in court. For this purpose, they are required to execute a bond to appear before the court. Otherwise, a warrant or summons to secure the attendance of the witnesses may be issued against them.

[37] We are therefore unanimous in our decision in that we find no merit in this appeal. We agree with the learned High Court Judge (subject to variation), that s. 134(4) is clear and unambiguous. In relation to the Court of Appeal's decision in *PP v. Yip Yee Foo*, it should be pointed out that this was in relation to criminal proceedings. In criminal proceedings, the right to disclosure of statements made in the investigation of an offence is a statutory right and is thus subject to the construction of relevant statutory provisions, particularly those under the Criminal Procedure Code. Therefore, s. 134(4) has to be read in the light of the statutory provisions as well as case laws on criminal procedure which do not apply in the context of civil proceedings.

[38] Once a considered choice is made by the one party in authority (ie when the appellant chose the civil process) as in the instant appeal, that party has to make the relevant documents available to the other party.

[39] Further, as a matter of public policy it is undesirable for the prosecution in a criminal trial to supply the defence with the statements obtained in the course of investigation, as there is a real danger of tampering with witnesses.

[40] However in a suit such as the present, the respondent is the defendant in a civil action brought by the appellant. One must look to the Securities Commission Act 1993 in deliberating as to whether the statements of witnesses and the investigation papers ought to be supplied to the appellant. In our view, what is not privileged would be liable to be disclosed. However we have a caveat to this proposition.

[41] We are mindful of the sensitivity of the issues at hand and having to balance those against the right of the respondent to mount his defence.

[42] Thus in the circumstances, our order is this. Whilst we affirm the Order of the High Court, we however vary the said Order to the extent that the respondent is to avail himself only to the documents and not the investigation files relating to the investigation against the respondent in relation to the allegations in paras. (i) to (iv) in Item 3 of Annexure A.

[43] With regard to the respondent's counterclaim, it is dismissed.

[44] We award costs of RM25,000 to the respondent. Since the appellant applies orally for a stay, we allow stay, pending disposal of the leave application to the Federal Court.

[45] Deposit is to be paid to the respondent towards costs.